

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A VARIANCE)
GRANTED TO MAYER BUILT HOMES,)
INC. BY PUGET SOUND AIR POLLUTION)
CONTROL AGENCY)

PCHB No. 79-147

WEDGEWOOD NEIGHBORHOOD COALITION)
AND MEREDITH WALKER,)

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

Appellants,)

v.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY AND MAYER BUILT)
HOMES, INC.,)

Respondents.)

This matter, the appeal of a variance granted by respondent from
its Section 8.06 of Regulation I, came on for hearing before the
Pollution Control Hearings Board, Nat W. Washington, Chairman, Chris
Smith and David Akana, Members, convened at Tacoma, Washington on
December 10, 1979. Hearing examiner William A. Harrison presided.
The final post-hearing submission of the parties was received on

1 January 3, 1980.

2 Appellants appeared by their attorney, Nicholas D. N. Harvey, Jr.
3 Respondent Mayer Built Homes, Inc. appeared by its attorney, Warren J.
4 Daneim. Respondent Puget Sound Air Pollution Control Agency appeared
5 by its attorney, Keith D. McGoffin. Reporter Marilyn Hoban recorded
6 the proceedings.

7 Respondent Puget Sound Air Pollution Control Agency moved to limit
8 the scope of this review to the record of proceedings before the Board
9 of Directors of the Puget Sound Air Pollution Control Agency.
10 Following written and oral argument said motion was denied at hearing
11 and the matter was heard de novo by the Pollution Control Hearings
12 Board. The record before the Board of Directors was admitted on
13 stipulation of the parties and was considered together with new
14 testimony and exhibits.

15 Having heard the evidence, having examined the exhibits, having
16 heard the argument of counsel, having read the briefs of counsel, and
17 being fully advised, the Pollution Control Hearings Board makes the
18 following

19 FINDINGS OF FACT

20 I

21 Respondent, pursuant to RCW 43.21B.260, has filed with this Board
22 a certified copy of its Regulation I containing respondent's
23 regulations and amendments thereto of which official notice is taken.

24 II

25 Respondent, Mayer Built Homes, Inc. (Mayer), seeks to develop 29
26 vacant acres in Tacoma bounded by North Pearl Street on the west,

1 North 37th Street on the south, Shirley Street on the east, and North
2 39th and 40th Streets on the north. Development is to consist of 46
3 single family dwellings, 50 townhouses and 300 apartments. The single
4 family dwellings would occupy 1/4 of the 29-acre site and would be
5 federally-sponsored, low-income housing. The townhouses and
6 apartments, with other means of financing, would occupy the remaining
7 3/4 of the site and would not be low income housing.

8 The site now contains some 13,000 cubic yards of vegetation
9 (trees, bushes and grass) and soil which Mayer proposes to dispose of
10 to facilitate the development.

11 III

12 The general population density in the area of the site is 4,308
13 persons per square mile. Section 8.06(1) of respondent Puget Sound
14 Air Pollution Control Agency's (PSAPCA's) Regulation I prohibits any
15 person from causing any outdoor fire for landclearing burning in an
16 area with a general population density of 2,500 or more persons per
17 square mile. Hauling vegetation from the site is an alternative to
18 landclearing burning¹.

19 Desiring to clear the land by burning, Mayer applied to the PSAPCA
20 Board of Directors on May 10, 1979, for a variance from Section 8.06
21 for the 29-acre site.

22
23 1. The PSAPCA Board earlier denied a request for variance for
24 landclearing by burning on a comparably sized tract located across the
25 street from the site in question (identified as Tucci and Sons on
26 Exhibit R-5).

IV

The 29-acre site measures approximately 300 x 450 meters and is bordered by residences on the north and east and baseball fields on the southwest. A fire conducted on the site as far away as possible from adjacent residences would be considerably less than 400 meters from the nearest residences, approximately 500 meters from the farthest residences bordering the site and less than 300 meters from the baseball fields.

The basic air pollution testimony presented to the PSAPCA Board was based on the erroneous assumption that the distance from the proposed burn to the affected residences would be 1500 meters (pp. 61-62 of 118).

V

A burn of 30 days duration utilizing four burn piles, as proposed, would produce particulate emissions of about 240 micrograms per cubic meter of air (ug/m^3) daily at 500 meters.² To this must be added 40 ug/m^3 of background suspended particulate, normally present at the site, resulting in a prospective particulate concentration of 280 ug/m^3 in the ambient air of the nearby residential areas. This level of particulate concentration exceeds not only the federal secondary ambient air quality standard of 150 ug/m^3 adopted by

2. Testimony to the PSAPCA Board placed particulate emissions at 130 ug/m^3 at 1500 meters (p. 61 of 118 referring to Schumakers report, Exhibit R-1, and chart, Exhibit R-2). We have found that distance to be wrong. Using the pertinent distance of 500 meters, Schumaker testified, at our hearing, to particulate concentrations of 240 ug/m^3 as found above. This testimony was not placed before the PSAPCA Board.

1 PSAPCA at Section 11.03(2), but exceeds even the federal primary
2 ambient air quality standard of 260 ug/m^3 . 40 CFR Sections 50.6(b)
3 and 50.7(b)³. Federal secondary air quality standards are deemed by
4 the U.S. Environmental Protection Agency to be necessary to protect
5 the public welfare from any known or adverse effects of a pollutant
6 whereas federal primary air quality standards are deemed necessary,
7 with an adequate margin of safety, to protect public health. 40 CFR
8 50.2(b).

9 VI

10 The top three inches of soil on the site indicate very high to
11 extremely high levels of arsenic and cadmium. Mayer proposes to
12 excavate and bury the top three inches of soil, however, some soil
13 will accompany the vegetation to be burned. Cadmium concentrations in
14 the vegetation on the site are also very high. Burning vegetation
15 will release both arsenic and cadmium from the site into the ambient
16 air and result in ambient levels which exceed the present norm. As
17 acknowledged by the Tacoma-Pierce County Health Department, without
18 critical testing of the vegetation debris, no firm evaluation of a
19 potential health impact from cadmium can be given. Such testing was
20 not conducted.

21
22 3. The 40 ug/m^3 of background suspended particulate is an
23 annual geometric mean. The 240 ug/m^3 anticipated particulate
24 emission was described in testimony as an "average of 30 day
25 measurement". Ambient concentrations of particulate may therefore
26 substantially exceed the sum of the two figures, 280 ug/m^3 , on
27 several or many days during the proposed 30-day burn. The federal
primary air quality standard of 260 ug/m^3 is a maximum 24 hour
concentration not to be exceeded more than once per year.

VII

Mayer contends that the added cost of hauling over burning for landclearing would impose an undue hardship on it. It argues that this is especially so because low income housing is proposed.

As evidence, Mayer offered one bid for clearing the land and hauling, \$66,500, and one bid for clearing the land and burning, \$36,365, for the entire 29-acre site, leaving a difference of some \$30,000.⁴

The construction costs of the proposed development, not including acquisition of the land, are:

Single family	\$1,932,000
Townhouses.	1,750,000
Apartments.	7,200,000
Total	<u>\$10,882,000</u>

Accepting without question the \$30,000 additional cost of hauling over burning made out by the respective bids, that additional cost is 3/10 of one percent of the total project cost.

4. At the hearing before the Board of Directors of PSAPCA, Mr. Kurtis Mayer, the principal of the appellant corporation, testified that the hauling bidder would use a tractor and trailer holding 60 cubic yards (p. 12 of 118, line 5). He further testified that dump fees would be \$168 for such a load (p. 11 of 113, line 33). For the estimated 12,000 cubic yards apparently used in the bid (p. 11 of 118, line 17) this totals \$33,600 in dump fees.

Mr. Mayer also testified that the round trip hauling distance from site to dump would be 25 miles (p. 14 of 118, line 22). At five miles per gallon and \$1.00 per gallon for diesel fuel, this totals \$1,000 in fuel cost.

Total dump fees and fuel costs would then be \$34,600 leaving the balance of the \$66,500 bid for hauling attributable to unspecified other factors. See questions of Chairman Lobe directed to Mr. Mayer at pp. 14 and 15 of 118 of the record before the Board of Directors of PSAPCA.

1 The portion of the project involving low income housing is to
2 occupy 1/4 of the 29-acre site and thus would proportionately sustain
3 1/4 of the \$30,000 additional cost for hauling or \$7,500. The
4 construction cost of the low income housing (the single family
5 dwellings above) is \$1,932,000. The proportionate additional cost for
6 hauling is 4/10 of one percent of the low income housing cost. --

7 The additional cost of hauling is an even smaller percentage of
8 the value at completion of the total project or the low income housing
9 portion.

10 VIII

11 The Board of Directors of PSAPCA convened a public hearing on the
12 Mayer variance application on July 12, 1979. Prior to that time
13 PSAPCA Director Mike Parker (Mayor of Tacoma) requested the
14 Tacoma-Pierce County Health Department's conclusions regarding the
15 application. Mr. Parker is Chairman of the Tacoma-Pierce County
16 Health Board. At the close of public testimony, Mr. Parker presented
17 the Health Department's conclusions and subsequently moved for
18 approval of the variance application. (Record before PSAPCA, pp. 26
19 to 30 of 118). Mr. Parker supported his motion in debate but later
20 moved to continue the public hearing for 30 days (Id., p. 39 of 118),
21 which motion was carried. (Id., p. 43 of 118).

22 The public hearing was reconvened on August 9, 1979. The
23 opponents of the variance application presented testimony in
24 opposition to the conclusions of the Health Department. Following
25 public testimony, Mr. Parker again moved for approval of the variance
26 and supported his motion in debate. (Id., p. 99 of 118, et. seq.).

1 The motion carried and resulted in PSAPCA Resolution No. 447 granting
2 a variance to Mayer from Section 8.06 of PSAPCA's Regulation I. The
3 motion and Resolution also made the Health Department responsible for
4 supervising the burn while reserving to PSAPCA the right to issue
5 notices of violation for matters outside the scope of the variance.

6 From this variance granted by PSAPCA, appellants appeal. --

7 IX

8 Any Conclusion of Law which should be deemed a Finding of Fact is
9 hereby adopted as such.

10 From these Findings the Board comes to these

11 CONCLUSIONS OF LAW

12 I

13 Appellants contend that Mr. Parker violated the appearance of
14 fairness doctrine while serving as a Director of PSAPCA in this
15 matter. Section 7.01 of PSAPCA Regulation I requires a public hearing
16 before the Board of Directors of PSAPCA before action on a variance
17 application. In Anderson v. Island County, 81 Wn.2d 312, 326, 501
18 P.2d 594, and case cited therein, the Supreme Court stated:

19 "It is axiomatic that, whenever the
20 law requires a hearing of any sort as a
21 condition precedent to the power to proceed,
22 it means a fair hearing, a hearing not
only fair in substance, but fair in
appearance as well."

23 Appellants first challenge Mr. Parker's action of directing the
24 Tacoma-Pierce County Health Department, over which he holds
25 supervisory power, to investigate the variance application. There is
26 no evidence that Mr. Parker directed the Health Department to reach a

1 given conclusion. The Health Department investigation was duly
2 presented at public hearing and opponents of the variance were
3 afforded an opportunity for rebuttal by the continuance of the public
4 hearing to a date some 30 days later. We cannot conclude on the
5 evidence presented that Mr. Parker's direction or presentation of the
6 Health Department investigation in this instance violated the
7 appearance of fairness doctrine.

8 Appellants next challenge Mr. Parker's support for the variance
9 expressed at the public hearing. Mr. Parker moved, and vigorously
10 supported in debate, the granting of the variance only when it was
11 announced that public testimony was complete at the hearing of July
12 12, 1979. Following debate, Mr. Parker moved for continuance of the
13 hearing and after completion of public testimony at the continued
14 hearing of August 9, 1979, again moved and supported granting of the
15 variance. Other Directors argued in opposition to the variance during
16 the periods of debate.

17 We conclude that Mr. Parker did not violate the appearance of
18 fairness doctrine while serving as a Director of PSAPCA in this matter.

19 II

20 Appellants contend that no variance may be granted from PSAPCA's
21 Section 8.06 prohibiting landclearing burning where, as here,
22 population densities are above the specified level. We do not agree
23 that, as a matter of law, a variance cannot be granted.

24 The State Clean Air Act provides for variances at RCW 70.94.181
25 which states in pertinent part:

1 Any person who owns or is in control of
2 any plant, building, structure, establishment,
3 process or equipment may apply to the
4 . . . Board [of PSAPCA] for a variance
from rules or regulations governing the
quality, nature, duration or extent of
discharges of air contaminants.⁵

5 This language was enacted in 1967. Thereafter, in 1972, the Clean Air
6 Act was amended with the language which PSAPCA Section 8.06
7 implements, namely RCW 70.94.750(2) which provides:

8 The following outdoor fires described
9 in this section may be burned . . .:

(1) . . .

10 (2) Fires consisting of residue of a
11 natural character such as trees, stumps,
12 shrubbery or other natural vegetation arising
13 from landclearing projects . . .; provided
that the fires described in this subsection may
be prohibited in those areas having a general
population density of one thousand or more
persons per square mile.

14 PSAPCA Section 8.06 provides:

15 It shall be unlawful for any
16 person to cause or allow any outdoor
fire for land clearing burning:

17 (1) In an area with a general population
18 density of 2,500 or more persons per square
19 mile;

(2) Within 100 feet of any structure other
than that located on the property on which
burning is conducted;

20 (3) Within the urbanized area as defined by
21 the United States Bureau of the Census unless the
22 Agency has verified that the average population
density on the land within 0.6 miles of the
proposed burning site is 2,500 persons per square
mile or less.

23
24 5. PSAPCA's implementing rule, Section 7.01(a) of Regulation 1
25 provides the same language as quoted above from RCW 70.04.181.

1 The words of a statute, unless otherwise defined, must be given
2 their usual and ordinary meaning. East v. King County, 589 P.2d 805
3 (Wash. App.) and cases cited therein. Likewise, PSAPCA's Section 8.06
4 is a "rule . . governing the . . . extent of discharges of air
5 contaminants" by allowing or prohibiting fires by reference to
6 population. This is the usual and ordinary meaning of those terms
7 appearing in the variance section, RCW 70.94.181. Notwithstanding
8 that the legislature addressed the subject of variances prior to that
9 of landclearing burning, we conclude that the variance section, RCW
10 70.94.181 and PSAPCA's corresponding Section 7.01 apply to rules, such
11 as PSAPCA's Section 8.06 here, implementing RCW 70.94.750(2) on
12 landclearing burning.⁶

13 III

14 The criteria for variance are found in PSAPCA's Section 7.01 and
15 RCW 70.94.181. These are:

- 16 1. The emissions occurring or proposed
17 to occur do not endanger public health or
18 safety; and
- 19 2. Compliance with the rules or regulations
20 from which variance is sought would produce
21 serious hardship without equal or greater
22 benefits to the public.

23 6. Our conclusion is buttressed by the permissive wording of RCW
24 70.94.750(2), above, that agencies such as PSAPCA may prohibit
25 landclearing burning by reference to population. Further, RCW
26 70.94.765 directs that statutory sections including RCW 70.94.750(2)
27 above, shall not be construed as prohibiting agencies such as PSAPCA
from allowing the burning of outdoor fires.

28 Lastly, the variance sections, RCW 70.94.181 was last amended in
29 1974, subsequent to enactment of the landclearing section, RCW
30 70.94.750(2), in 1972. That amendment contained no language removing,
31 withdrawing or excepting the landclearing section, RCW 70.94.750(2),
32 from the broad ambit of the variance section.

1 The emissions proposed to occur will endanger public health through
2 violation of the federal primary air quality standard for
3 particulates, as well as by release of quantities of arsenic and
4 cadmium without the testing necessary to firmly evaluate health
5 impact.

6 There was no showing that requiring compliance with PSAPCA
7 regulation 8.06 would cause serious hardship to respondent Mayer Built
8 Homes, Inc. There is no question but that it costs more in a
9 construction project to haul clearing debris than to burn it. In this
10 case it will cost \$7,500 more to haul than to burn the material
11 cleared from the area to be utilized for low rent housing, an amount
12 which is 4/10 of 1% of the total cost of the project. This is a
13 hardship in the interest of clean air and public health that all
14 developers in an area with a population density of 2,500 or more
15 persons per square mile must bear, but it is not a serious hardship
16 within the meaning of RCW 70.94.181(1)(b) or PSAPCA's Section
17 7.01(a)(2) in this case.

18 Even if Mayer Built Homes, Inc. had shown that it would suffer a
19 serious hardship (we find that it would not), it would still have been
20 required to meet a second test by showing that the public would
21 benefit more from a varying of the burning regulations than from
22 requiring Mayer Built Homes to abide by them. The evidence in the
23 PSAPCA Record and evidence taken before this Board did not meet this
24 test.

25 The public benefit of low income housing is not at issue. Of the

1 claimed \$30,000 added cost of landclearing by hauling, \$22,500 (or 3/4
2 of the project) must be charged to ordinary housing leaving only
3 \$7,500 (or 1/4 of the project) chargeable to low cost housing.
4 Three-fourths of all the smoke would be attributable to the burning of
5 debris from land cleared for an ordinary housing development, and only
6 one-fourth would be related to low rent housing. This \$7,500,
7 constitutes but 4/10 of one percent of the cost of the low income
8 housing and must be weighed against the manifest prospect that public
9 health will be endangered if landclearing is allowed by burning rather
10 than hauling.

11 Appellant has shown that the criteria set forth for variance have
12 not been met. The variance should therefore be reversed.

13 IV

14 We have carefully reviewed the appellants' remaining contentions
15 and conclude they are without merit.

16 V

17 Any Finding of Fact which should be deemed a Conclusion of Law is
18 hereby adopted as such.

19 From these Conclusions the Board enters this

20 ORDER

21 Resolution No. 447 of the Puget Sound Air Pollution Control Agency
22
23
24
25
26

1 granting a variance to Mayer Built Homes, Inc. is hereby reversed.

2 DATED this 7th day of February, 1980.

3 POLLUTION CONTROL HEARINGS BOARD

4 *Nat W. Washington*
5 NAT W. WASHINGTON, Chairman

6 *Chris Smith*
7 CHRIS SMITH, Member

8 *David Akana*
9 DAVID AKANA, Member